STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL WASIELEWSKI,

Plaintiff-Appellant,

v

PRICE WATERHOUSE, LIONEL ENDSLEY, and MATT SCHUYLER,

Defendants-Appellees.

UNPUBLISHED
November 4, 1997

No. 195426
Wayne Circuit Court
LC No. 95-507767

Before: Corrigan, C.J., and Michael J. Kelly and Hoekstra, JJ.

PER CURIAM.

In this employment action alleging handicap discrimination and retaliatory discharge, plaintiff Michael Wasielewski appeals by right the order granting defendants' motion for summary disposition under MCR 2.116(C)(10). We unanimously affirm the court's order regarding the retaliation claim; a majority holds that the court did not err in granting summary disposition regarding the handicap discrimination claim.

Plaintiff began working for defendant Price Waterhouse in 1980. Price Waterhouse promoted plaintiff to Office Services Supervisor within two years. At the time of his discharge in 1993, plaintiff's job responsibilities included: package handling, mail pickup and delivery, supply purchasing and maintenance, janitorial services, physical plant maintenance, furniture moving and setting up or packing up offices.

In 1986, plaintiff suffered a back injury at work. He had surgery in 1991, for which he filed a worker's compensation claim. Following his surgery, plaintiff was restricted from engaging in lifting, pushing, pulling, twisting, turning, and bending. Plaintiff later asked defendants to hire additional staff to do the required lifting, to replace two assistants who had left. Defendant Matt Schuyler, Personnel Director, told plaintiff that newly-hired John Truitt would assist with lifting. After Truitt resigned, Price Waterhouse hired Robert Swihart to perform manual labor tasks that plaintiff could not perform. Plaintiff reinjured his back in summer, 1993. Plaintiff's employment ended in November 1993.

Plaintiff filed suit against Price Waterhouse, Schuyler, and defendant Lionel Endsley, his former supervisor, alleging that defendants discharged him in retaliation for seeking workers' compensation benefits and discriminated against him because of his handicap.[1] Plaintiff claims that he was discharged and that defendants did so with discriminatory intent. Defendants contend that plaintiff chose to leave after a negative performance review cited plaintiff's "bad attitude" toward fellow employees. The circuit court granted summary disposition in favor of defendants.

I.

Plaintiff first contends that the circuit court erred in granting summary disposition on his handicap discrimination claim because a genuine issue of material fact existed regarding whether defendants failed to reasonably accommodate his handicap. We disagree.

This Court reviews de novo an order granting a motion under MCR 2.116(C)(10).[2] *Hall v Hackley Hospital*, 210 Mich App 48, 53; 532 NW2d 893 (1995). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Id.* A court grants a MCR 2.116(C)(10) motion "when, except with regard to the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. This Court considers the pleadings, affidavits, depositions, admissions, and documentary evidence in the light most favorable to the nonmoving party. *Id*.

A prima facie case under the Michigan Handicappers' Civil Rights Act (HCRA), MCL 37.1101 *et seq.;* MSA 3.550(101) *et seq.,* requires a plaintiff to prove that: (1) the plaintiff is "handicapped" as defined by the HCRA;[3] (2) the handicap is unrelated to the plaintiff's ability to perform the duties of a particular job; and (3) the employer has discriminated against the plaintiff in one of the ways enumerated in the HCRA. *Id.* at 53-54.

Michigan courts previously have interpreted the first two elements of a prima facie case as requiring the plaintiff to prove either that the plaintiff's handicap did not interfere with the job or would not interfere with the job if reasonably accommodated. *Id*. at 54 n 2. The HCRA provides that an employer shall accommodate a handicapped employee for employment unless the employer demonstrates that the accommodation would impose an undue hardship. MCL 37.1102; MSA 3.550(102).

To sustain a claim under the HCRA, the plaintiff-employee must prove that the defendant-employer failed to accommodate the handicap. *Hall, supra* at 54-55. Once the plaintiff has proven a prima facie case, the defendant has the burden to produce evidence that the accommodation would impose an undue hardship. *Id*. When the defendant has met this burden of production, the burden shifts to the plaintiff to prove by a preponderance of the evidence that the accommodation would not impose an undue hardship. *Id*.; MCL 37.1210(1); MSA 3.550(210)(1).

Plaintiff has not established a genuine issue of material fact that defendants failed to reasonably accommodate him. In *Hall, supra,* the plaintiff, who was asthmatic, claimed that her employer failed to reasonably accommodate her by placing her in a different position or by banning smoking at her place of

employment. *Id.* at 51-53. This Court held that the employer was not required to accommodate the plaintiff in either of the suggested ways. Because the Legislature did not impose a specific duty to place an employee into a new position, this Court declined to read such a requirement into the HCRA. *Id.* at 58. Moreover, the 1990 amendments to the HCRA specifically recognized three types of accommodation: (1) purchasing equipment and devices, (2) hiring readers or interpreters, and (3) restructuring jobs and altering schedules for minor or infrequent duties. *Id.* at 58.

Neither equipment/devices nor readers/interpreters are relevant in this case. Accordingly, we examine whether the HCRA required defendants here to restructure plaintiff's job to accommodate his inability to lift. This type of accommodation requires that the job duties that plaintiff cannot perform be "minor or infrequent." MCL 37.1210(15); MSA 3.550(210(15).

Plaintiff's own description of his job illustrates that the duties were neither minor nor infrequent. In a handwritten memorandum, plaintiff wrote: "Everything in O.S. [Office Services] requires lifting, which I am unable to do. Matt [defendant Schuyler] asked about a secretary helping with mail. I don't see any problem only cautioning that, for example, on 8/2 we shipped 375#'s UPS and maybe 200#'s Fed Ex [sic]." In his affidavit, plaintiff described additional physical duties for which he was responsible in Troy:

> The files . . . needed to be weeded out. Those that were selected to be sent to storage needed to be logged and boxed to be sent off-site. Those that were needed by staff moving downtown needed to be packaged and transported. The file rooms downtown needed to be weeded and adjusted also. And, there was the regular rotation of files to storage that needed to be completed at this time. . . . I was solely responsible for the Office Services work . . . .

In his brief and supporting documentation, plaintiff never alleged that lifting was a minor or infrequent duty. To the contrary, the above facts demonstrate that lifting comprised a considerable portion of plaintiff's job. Also, plaintiff presumably would not have requested two additional assistants if the lifting duties were minor or infrequent. The HCRA thus did not require defendants to restructure plaintiff's job to accommodate his lifting restrictions.

The dissent suggests that plaintiff has raised a question of fact on the accommodation issue. We respectfully disagree. Plaintiff's comment that he was "solely responsible" for the Office Services work in Troy demonstrates that his own job required him to lift – he was not functioning only as a supervisor. Plaintiff's job duties included package handling, mail delivery, janitorial services and furniture moving. Even viewing the facts most favorably toward plaintiff, plaintiff did not argue that his duties primarily were supervisory in nature.

Also, in contrast to the dissent, we do not recognize a meaningful distinction, in this context, between failing to hire additional workers to assist plaintiff and "the withdrawal of established support." The record does not reflect that defendants withdrew the assistants and refused to replace them.

Rather, defendants hired Truitt and Swihart to help plaintiff. Nonetheless, the extensive lifting requirements of plaintiff's job made him unable to perform it despite the help of assistants.

Further, plaintiff effectively is arguing that Price Waterhouse was bound to hire more than one assistant to reasonably accommodate his handicap. The HCRA does not call for such an accommodation. Plaintiff cites no authority; we will not search for authority to sustain a party's argument. *Ramsey v Michigan Underground Storage Tank Fin Assurance Policy Bd*, 210 Mich App 267, 271; 533 NW2d 4 (1995).

Case law also supports our ruling on this issue. In *Hatfield v St Mary's Medical Center*, 211 Mich App 321, 326-327; 535 NW2d 272 (1995), this Court held that under the pre-1990 HCRA, a condition was not a handicap unless it was unrelated to an employee's ability to perform the job and the employer therefore had no duty to modify the employee's job duties. *Id*. Under *Hall, supra*, the 1990 amendments limited the requisite accommodation to purchasing equipment and devices, hiring readers or interpreters, and restructuring jobs and altering schedules for minor and infrequent duties. *Hall, supra* at 58. The amendments do not require an employer to hire more than one person to assist a handicapper with regular job duties. As stated in *Hall*, "[t]his Court is precluded from reading into the HCRA something not otherwise clearly therein." *Id.* at 59.

Plaintiff further argues that hiring additional assistants for him would not impose an undue hardship on Price Waterhouse given its size and financial resources. This argument is irrelevant. MCL 37.1210(1); MSA 3.550(210)(1) provides that the undue hardship analysis arises only after the handicapped employee proves a prima facie case. Because plaintiff has not proven a prima facie case, we do not reach the undue hardship issue.

Plaintiff next contends that various obligation of employers contained within the Americans with Disabilities Act (ADA), 42 USC § 12111(9)(B),[4] should be read into the HCRA. This Court previously declined to read ADA requirements into the HCRA. *Hall, supra* at 58. Regarding the ADA provision requiring employers to place handicappers in vacant positions, this Court noted that the Legislature did not include such a provision when it enacted the 1990 HCRA amendments, although it could have done so. *Id.* Plaintiff's argument thus is better directed to the Legislature.

Plaintiff's contention that Price Waterhouse should have given his "temporary [back] condition" a reasonable time to heal fails because plaintiff has not demonstrated that he requested a reasonable time to heal.

II.

Plaintiff next contends that the circuit court erred in granting summary disposition on his claim that defendants retaliated against him for seeking worker's compensation benefits. We unanimously reject plaintiff's argument. MCL 418.301(11); MSA 17.237(301)(11) forbids the discharge of, or discrimination against, an employee because the employee filed a complaint under the Worker's Disability Compensation Act, MCL 418.101 *et seq.*; MSA 17.237(101) *et seq*. Plaintiff has the burden to prove that his worker's compensation claim was a significant factor in Price Waterhouse's

decision to discharge him. *Goins v Ford Motor Co*, 131 Mich App 185, 198; 347 NW2d 184 (1983).

Plaintiff claims that his 1991 worker's compensation claim spawned a series of discriminatory acts that led to his 1993 discharge. Plaintiff, however, has offered no evidence to link his 1991 claim to defendants' alleged discriminatory conduct. Plaintiff therefore has failed to show that his worker's compensation claim was a significant factor in defendants' actions. As evidence of retaliation, plaintiff submits that defendants never replaced his two former assistants. Plaintiff's admission that defendant hired Truitt and Swihart to assist him belies this argument. Plaintiff thus has offered no evidence of discriminatory conduct by defendants that is connected to his 1991 worker's compensation claim.

Plaintiff finally indicates that his discharge was in retaliation for an *anticipated* worker's compensation claim that he planned to file later in 1993. His argument fails because a retaliatory discharge case must be based upon a *filed* worker's compensation claim, not on an *anticipated* claim. *Griffey v Prestige Stamping*, 189 Mich App 665, 667-668; 473 NW2d 790 (1991).

Affirmed.

/s/ Maura D. Corrigan
/s/ Joel P. Hoekstra

[1] Plaintiff's suit also alleged age discrimination and sexual orientation discrimination. Plaintiff has abandoned those claims on appeal.

[2] Defendants moved for summary disposition under both MCR 2.116(C)(8) and (C)(10). The circuit court did not specify which subsection served as the basis for its order. Because the court referred to plaintiff's failure to put forth prima facie evidence, we interpret the motion as granted under MCR 2.116(C)(10). *GAF Sales & Service, Inc v Hastings Mutual Ins Co*, 224 Mich App 259, 261 n 1; ___ NW2d ___ (1997).

[3] The HCRA defines "handicap" as

> [a] determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic: . . . substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion. [MCL 37.1103(e)(i)(A); MSA 3.550(103)(e)(i)(A).]

[4] That subsection holds that "reasonable accommodation" includes: "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities." 42 USC § 12111(9)(B).